



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 43 OF 2006

MAVOLONI COMPANY LIMITED.....PLAINTIFF

VERSUS

LAND REGISTRAR, THIKA DISTRICT.....1ST DEFENDANT

LAND REGISTRAR, MACHAKOS DISTRICT.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

AND

AGRICULTURAL FINANCE COOPERATION.....1ST INTERESTED PARTY

GREEN ACRES VEGETABLE AND FLOWER

EXPORTING COMPANY LIMITED.....2ND INTERESTED PARTY

MWAKAWA INVESTMENTS LIMITED.....3RD INTERESTED PARTY

RULING

1. In the Notice of Motion dated 29th November 2018, the 2nd Interested Party has sought for the following orders:

- a. This court be pleased to order the registered proprietors of Ndalani/Mavoloni/Block 1/1131, Ndalani/Mavoloni/Block 1/1263-1866 and Kakuzi/Ithanga/Gituamba/Block 1/876 to be enjoined as Interested Parties in the suit herein.***
- b. Leave be granted to the 2nd Interested Party's counsel, Messrs. S.O. Owino and Associates Advocates to effect substituted service to the registered proprietors of Ndalani/Mavoloni/Block 1/1131, Ndalani/Mavoloni/Block 1/1263-1866 and Kakuzi/Ithanga/Gituamba/Block 1/876 begin necessary parties to this suit by means of substituted service, being the publication of an advertisement in either the Daily Nation, The East African Standard or The Star Newspapers.***
- c. A time be fixed for the registered owners of the aforesaid parcels of land being Interested Parties to join these proceedings.***
- d. Costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 2nd Interested Party's Director who has deposed that the Intended Interested Parties are the registered proprietors of parcels of land known as Ndalani/Mavoloni/Block 1/1131, 1263-1866 and Kakuzi/Ithanga/ Gituamba/Block 1/876; that the said Intended Interested Parties are necessary parties to this suit and that the said Intended Interested Parties be served by means of substituted service by public advertisement in either the Daily Nation, the East African Standard or the Star Newspapers.

3. It is the 2nd Interested Party's case that on 14th November, 2017, the 1st and 2nd Defendants were ordered by the court to provide copies of the official searches and copies of the Green cards of the suit properties; that the said searches were provided by the Attorney General and that the participation of the registered owners of the suit properties would assist the court in dealing with all the prevailing issues regarding the suit property.

4. The 2nd Interested Party lastly deponed that due to the large number of the Intended Interested Parties, and the fact that their physical addresses are unknown, it would be very costly and time consuming to effect service on each and every Intended Interested Party.
5. The Plaintiff's Chairman deponed that the deponent of the Supporting Affidavit is not a Director of the Applicant; that the Applicant made similar Applications dated 16th December 2009 and 1st September, 2011 and that the Intended Interested Parties bought their respective parcels of land from the Plaintiff who passed a good title to them.
6. The Plaintiff's Chairman finally deponed that the Applicant has not shown the attempts he has made to serve the said parties with the current Application and that the Application should be dismissed.
7. The Applicant's counsel submitted that the main issue in dispute in this suit revolves around the ownership of the suit properties and that the suit properties have been sub-divided by the Plaintiff and sold to third parties.
8. Counsel submitted that the participation of the third parties to whom the suit properties have been transferred to will enable this court to settle all the questions properly, effectively and finally; that the decision of the court is likely to affect the said third parties and that the Application should be allowed. Counsel relied on numerous authorities which I have considered.
9. The Plaintiff's/Respondent's advocate submitted that the Applicant has not demonstrated how the Proposed Interested Parties will assist the court; that the Intended Interested Parties bought their respective portions of land from the Plaintiff and that they claim the parcels of land through the Plaintiff.
10. The Plaintiff's advocate submitted that the deponent of the Supporting Affidavit is neither a Director of the Applicant, nor has he obtained the consent of the Board of Directors of the Plaintiff to plead on behalf of the Applicant and that the Supporting Affidavit contravenes the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules.
11. The Respondent's counsel submitted that the Applicant has not met the evidentiary threshold to be granted leave for substituted service; that no evidence has been tendered to show the efforts made to serve the Intended Interested Parties and that the Application should be disallowed.
12. This suit was commenced by way of a Plaint dated 9th May, 2006. In the Plaint, the Plaintiff alleges that it is the owner of land known as Kakuzi/Ithanga/Gituamba/Block 1/876 and Ndalani/Mavoloni/ Block 1/1131 measuring 152.3 Ha and 154.14 Ha respectively; that in 1998/1999, the 1st and 2nd Defendants unlawfully cancelled the Plaintiff's Title Deeds and that the said Defendants unlawfully issued Title Deeds to Green Acres Vegetables and Export Company Limited, who are the 1st and 2nd Interested Parties herein.
13. The record shows that by the consent of all the parties, this court directed that 1st and 2nd Defendants to file in this court official searches in respect to the suit properties, including the sub-divisions thereof. It is the registered proprietors of the said sub-divisions that the Applicant is seeking to enjoin in this suit.
14. The Plaintiff has opposed the Application on the ground that, firstly, the deponent of the Supporting and Further Affidavit is not a Director of the Mwakawa Investments Limited, the 3rd Interested Party and that the Application does not meet the requirements of Order 4 Rule 1(4) of the Civil Procedure Rules.
15. The Plaintiff's/Respondent's counsel submitted that in any event, it is the Plaintiff who sold to the Proposed Interested Parties the suit properties and that they need not be enjoined in this suit.
16. Although the issue of the deponent of the Applicant's Supporting Affidavit not being a Director of the 3rd Interested Party was raised by the Plaintiff/Respondent in the Replying, the Applicant did not exhibit any evidence of being a Director or an authorized official of the 3rd Interested Party in his Further Affidavit.
17. Order 4 Rule 1 (4) of the Civil Procedure Rules provides as follows:

“(4) Where the Plaintiff is a Corporation, the Verifying Affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”
18. The deponent of the 3rd Interested Party's Supporting Affidavit and the Further Affidavit has neither annexed any evidence to show that he is an officer of the 3rd Interested Party nor authorized under the seal of the company to swear the two Affidavits.
19. Had the deponent of the two Affidavits provided evidence to show that he is a Director of the 3rd Defendant, I would have given him the benefit of doubt by directing that the issue of whether he had authority to swear the Affidavits be taken up at trial. However, this particular deponent did not bother to produce evidence showing the nexus between himself and the 3rd Defendant. That, in my view, is unacceptable considering that the identity of parties, more so where an objection has been raised, is critical.
20. In the absence of any form of evidence showing that the deponent of the Affidavits in support of the Application dated 29th November, 2018 is a Director or a duly authorized officer of the 3rd Interested Party, I find the Application dated 29th November, 2018 to be incompetent. The Application is struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE